

Michael Millen  
Attorney at Law (#151731)  
119 Calle Marguerita Ste. 100  
Los Gatos, CA 95032  
Telephone: (408) 871-0777  
Fax: (408) 516-9861  
email: [MikeMillen@aol.com](mailto:MikeMillen@aol.com)

Attorney for Plaintiffs

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

SUSAN SWANSON, SHANE MCGUIRE, and  
CLAUDIA MCGUIRE, individually and on behalf  
of all others similarly situated,

Plaintiffs,

v.

USPROTECT CORPORATION, a Maryland  
corporation formerly known as HOLIDAY  
INTERNATIONAL SECURITY, INC., and DOES  
1 TO 25,

Defendants.

NO.: C05-00602 JR (HRL)

**PLAINTIFFS' RESPONSE TO  
USPROTECT'S SUPPLEMENTAL  
BRIEFING**

**Date: December 16, 2005**

**Time: 9:00 a.m.**

**Dept: 3**

**Judge: Fogel**

Plaintiffs hereby submit this **Response to USProtect's Supplemental Briefing**.

As discussed at the hearing, the issue of whether Labor Code §226.7 is a penalty or a wage is a "hot topic" in the field of wage and hour law.

As defendants have correctly pointed out, three courts have found the §226.7 payments to be penalties. Caliber Bodyworks, Inc. v. Superior Court 134 Cal.App.4<sup>th</sup> 365 (2005); Murphy v. Kenneth Cole Productions, Inc., 134 Cal.App.4<sup>th</sup> 728 (2005); Mills v. Superior Court, \_\_ Cal.App.4<sup>th</sup> \_\_ (2006), 2006 Cal.App.LEXIS 98 (Jan. 27, 2006).

Defendants have also correctly pointed out that two other courts have found just the opposite –that §226.7 payments are wages and not penalties. Tomlinson v. Indymac Bank, F.S.B.

1 (C.D. Cal. 2005) 359 F.Supp.2d 891; National Steel and Shipbuilding Co. v. Superior Court, \_\_  
2 Cal.App.4<sup>th</sup> \_\_, 2006 Cal.App. LEXIS 48 (Jan. 20, 2006).

3 This is an unusual situation: in less than 12 months no less than 5 courts have weighed in on  
4 this narrow topic of Labor Code interpretation, and the current “score” is 3 to 2. Rather than  
5 keeping a running scorecard, plaintiffs would suggest that the court defer this topic until the  
6 California Supreme Court has had an opportunity to rule or at least until the case at bar substantially  
7 progresses in discovery. Otherwise, every time another case comes out the last losing side will  
8 move for reconsideration based upon the existence of new case law. If the court believes it must  
9 address this issue immediately, then assumably the court will review the five cases and choose the  
10 approach it believes is most warranted.

11 Plaintiffs must comment, however, on the unfair, out-of-context assertion that Mills  
12 somehow held there was no private right of action under §226.7. The Mills court did not discuss  
13 whether there was or was not a private right of action under §226.7. While the Mills court noted  
14 that language explicitly mentioning a private right of action was taken out of the legislation, it  
15 discussed the point no further, and certainly did not suggest that the trial court was wrong for  
16 allowing Ms. Mills to proceed on her other §226.7 causes of action. In fact, the introduction of the  
17 Mills case makes clear that “[t]he issue presented in this case is whether the above language  
18 describes a wage due to the employee or a penalty to the employer. We conclude it imposes a  
19 penalty on the employer.” (Slip Opn., p. 2.) The trial court allowed Mills to continue with her  
20 §226.7 private right action and only upheld the demurrer as to those §226.7 causes of action in  
21 which Mills was arguing that the payments were wages instead of penalties; the other §226.7 causes  
22 of action were to continue in the court below, assumably because Labor Code §218 allows private  
23 actions to recover penalties. A case is not precedent for an issue not addressed, and plaintiffs  
24 cannot point to any of the five recent §226.7 decisions which denied aggrieved plaintiffs their right  
25 to sue under §226.7; while the courts are wrestling with the statute of limitations for §226.7 private  
26 actions, there is no mention in any of them that private plaintiffs lack the right to sue for violations.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Dated: February 8, 2006



---

MICHAEL MILLEN, ESQ.  
ATTORNEY FOR PLAINTIFFS